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Title**WRITTEN TESTIMONY OF THE**

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Title**FREEDOM TO ADVERTISE COALITION**

Title

Title**ON THE PROPOSED ATTORNEYS GENERAL**

Title

Title **TOBACCO SETTLEMENT**

Title

Title**PRESENTED BY DAVID VERSFELT**

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Title**BEFORE THE**

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Title**COMMITTEE ON COMMERCE,**

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Title**SCIENCE AND TRANSPORTATION**

Title

Title**OF THE UNITED STATES SENATE**

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Title**105TH CONGRESS**

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Title**MARCH 3, 1998**

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## 4I. INTRODUCTION

Chairman McCain, Senator Hollings, and Members of the Commerce Committee, I am pleased to have the opportunity to testify on behalf of the Freedom to Advertise Coalition (FAC) about the Proposed Attorneys General Tobacco Settlement ("Proposed Settlement") and various Senate bills which address the subject.

My name is David Versfelt and I am a partner with the New York law firm of Donovan, Leisure, Newton & Irvine LLP where I serve as the general counsel to the American Association of Advertising Agencies. The American Association of Advertising Agencies is one of FAC's seven member groups.

Founded in 1987, FAC is a coalition of advertising and media associations dedicated to preserving the constitutional right to advertise and promote all legal products and services. Representing a wide array of advertising and media interests, FAC's six other member groups are: the American Advertising Federation; the Association of National Advertisers; the Direct Marketing Association; the Magazine Publishers of America; the Outdoor Advertising Association of America; and the Point-of-Purchase Advertising Institute.

From the outset, we want to emphasize that we strongly support the effort to develop legislation that will keep cigarettes and other tobacco products out of the hands of our nation's youth. Young people simply should not smoke or use tobacco products. We believe that enacting strong laws to address the sale and use of tobacco by minors is not only constitutional but essential. Without trespassing upon the First Amendment, Congress can implement such proven strategies as: standardized age-of-purchase laws, cigarette vending machine restrictions, proof-of-age requirements, counter- advertising, and education campaigns. We also support state and local tobacco retail licensing, including strong penalties for retailers or purchasers who violate the law.

Nevertheless, we are concerned by the prospect that Congress might statutorily enact the unprecedented, sweeping advertising restrictions in the Proposed Settlement. The First Amendment states unequivocally that, "Congress shall make no law . . . abridging the freedom of speech." Congressional enactment of the restrictions would mean government action rather than private action and would run afoul of the First Amendment. Congressional imposition of content and format based restrictions would establish precedents that go far beyond the subject of tobacco advertising. There are

numerous provisions of the Proposed Settlement that would violate the Constitution if enacted into law. These prohibitions could lead to similar restrictions on the creative process associated with the development of advertising campaigns for other legal products and services.

We support the tobacco companies' willingness to place voluntary restrictions on their speech. Voluntary self-censorship is far different than government mandates. In light of these constitutional issues, we have serious concerns about S. 1414 which would enact advertising restrictions into law.

Finally, we want to address the recently-disclosed documents from the tobacco industry which deal with targeting underage consumers through advertising practices. FAC's position on this issue is unequivocal: tobacco advertising specifically targeted to minors is illegal, irresponsible and wrong. To the extent that any tobacco advertisement or advertising campaign specifically targets children, those advertisements are fully regulated under current law by the Federal Trade Commission. The FTC has ample authority to ban such advertisements and impose other penalties as appropriate.

The remainder of this testimony elaborates on our First Amendment concerns and addresses several other related issues. In the following order, the testimony:

(1) describes the strategies and non-speech restrictive proposals that have proven effective in the effort to reduce illegal underage tobacco use; (2) details how the congressional enactment of these restrictions would violate the First Amendment; (3) challenges the assertion that the Food and Drug Administration (FDA) should replace the Federal Trade Commission (FTC) as the federal agency responsible for regulating tobacco advertising practices; and (4) concludes with the recommendation that Congress should not enact the advertising restrictions.

## II. FAC STRONGLY SUPPORTS LEGISLATION THAT WILL REDUCE ILLEGAL, UNDERAGE TOBACCO USE

FAC wholeheartedly endorses the effort to enact comprehensive tobacco legislation that will reduce illegal, underage tobacco use. While we agree with this important end, we strongly disagree with those means that may result in the government's unconstitutional infringement of commercial speech. Indeed, FAC is currently engaged in litigation against the enforcement of the Food and Drug Administration's anti-tobacco advertising regulations, which a federal district court struck down in April. A three-judge panel of the Fourth Circuit Court of Appeals heard an appeal by the government in August and we await a decision in that case.

Instead of government restrictions on speech, Congress should pursue proven strategies for reducing underage tobacco use, including heightening enforcement of the existing laws of all fifty states that prohibit tobacco use by minors. FAC endorsed the Synar regulations by the Department of Health and Human Services (HHS) that require states to conduct random, unannounced inspections of tobacco sales outlets in order for them to receive their federal block grants for substance abuse prevention and treatment programs. Similarly, FAC supports the Proposed Settlement's restrictions on underage access to tobacco products, such as requiring proof of age at the time of sale, imposing a ban on cigarette vending machines, banning free product samples, and requiring a nationwide licensing system for all sellers of tobacco products. Failure to stop sales to minors should lead to loss of a license. We urge Congress to consider requiring penalties, such as participating in tobacco education programs, or the loss of driving privileges for those minors who illegally acquire and use tobacco products. In fact, many states already have similar laws regarding underage alcohol use. None of these restrictions raise constitutional issues.

Strategies for addressing underage consumption should also focus on increasing the level of speech about the adverse health consequences associated with tobacco use. FAC very much supports the use of public service advertising and anti-youth smoking education campaigns. Indeed, the Proposed Settlement would implement the largest, most sustained nationwide public education campaign ever for tobacco or for any other public health goal. We look forward to working with the Congress, the Administration, and the States to implement this campaign.

Indeed, the advertising industry has a long history of making important contributions on this front. For instance, billboards have played a significant role in state anti-smoking campaigns in Arizona, California, Massachusetts, Minnesota, and Michigan. Likewise, point-of-purchase media has been used effectively to convey important information regarding age-of-purchase restrictions.

## III. CONGRESSIONAL ENACTMENT OF THE ADVERTISING RESTRICTIONS WOULD VIOLATE THE FIRST AMENDMENT

Congressional enactment of the Proposed Settlement's advertising restrictions would violate the First Amendment. Numerous scholarly commentators and officials

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[1] 45 C.F.R. § 96.130 (1996).

already have noted such criticisms. Harvard Law School Professor Laurence Tribe -- a longtime tobacco critic -- testified before the Judiciary Committee in July that "the proposed restrictions on tobacco advertising would raise very serious First Amendment implications if they were to be enacted in law by Congress." Civil liberties scholar Rodney Smolla of the Marshall-Wythe School of Law at The College of William & Mary stated in August that "codification of the advertising provisions of the agreement would turn a voluntary, self-imposed restriction by the tobacco industry into an act of Congress, triggering the protections of the First Amendment." Burt Neuborne of the New York University School of Law stated last October that "[w]hatever one may think of the social benefits of such [tobacco] advertising restrictions, everyone agrees that they would pose extremely difficult First Amendment issues if the government attempted to impose them involuntarily on the industry. . . . most, if not all, of the speech restrictions would fail to survive serious First Amendment scrutiny." In fact, a principal architect of the Proposed Settlement, Mississippi Attorney General Michael Moore testified before this Committee in July that "if you passed it [the advertising restrictions] in Congress, it might get struck down on First Amendment challenges."

Under the test established by the Supreme Court in Central Hudson v. Public Service Commission, 447 U.S. 557 (1980), when the government seeks to restrict lawful, nonmisleading commercial speech, it has the burden of demonstrating that the interests it seeks to serve are substantial, that the restrictions it seeks to impose will "directly advance" those interests, and that the restrictions are "narrowly tailored" and are "not more extensive than is necessary" to advance those interests.

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[2] Appendix A contains a broader analysis of the Proposed Settlement by Burt Neuborne.

Unquestionably, the goal of reducing illegal, underage tobacco consumption by minors is a substantial government interest, a goal which FAC wholeheartedly supports. Nevertheless, congressional enactment of the advertising restrictions would violate the latter critical elements of the commercial speech doctrine: they are not narrowly tailored and are far more extensive than necessary.

The scope of the restrictions is extraordinary. They would ban: (1) all outdoor advertising, including advertising in enclosed stadia and storefront windows; (2) all brand-name sponsorship of sporting, cultural, and other events; (3) human images and cartoon characters in all advertisements, not just those advertisements in publications with high numbers of youth readers; (4) tobacco brand names and logos on non-tobacco merchandise; and (5) the use of all new advertising media. They would virtually eliminate point-of-purchase advertising as a viable medium and drastically restrict the content of most magazine, newspaper, and all direct mail advertisements by imposing a draconian black-on-white text-only format. Moreover, the restrictions would impose a complete ban on self-service displays of tobacco products. In other words, the sweeping breadth of the restrictions suggests that their congressional enactment would not survive the fourth prong of Central Hudson.

In the most recent Supreme Court case on commercial speech, seven justices concluded that an advertising ban on certain alcohol beverage advertising failed the

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[3] Appendix B contains a broader summary of the Proposed Settlement's advertising and marketing restrictions.

narrow tailoring requirement because the state could have pursued its goal through alternative forms of regulation that would not involve any restriction on speech. 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495, 1510, 1519, 1521-22 (1996) (plurality opinion). The principal opinion of Justice Stevens in that case is telling for congressional consideration of the Proposed Settlement:

> [A]ttempts to regulate speech are more dangerous than attempts to regulate conduct. That presumption accords with the essential role that the free flow of information plays in a democratic society. As a result, the First Amendment directs that government may not suppress speech as easily as it may suppress conduct, and that speech restrictions cannot be treated as simply another means that the government may use to achieve its ends.

Id. at 1512. If Congress determines that the education and access provisions of the Tobacco Settlement are insufficient, then it should consider additional measures, such as a minimum age for possession and use of tobacco products. But whatever means are selected, the Constitution requires Congress to employ education (more speech) and access restrictions before it enacts a wholesale prohibition on free speech.

Perhaps the most insidious restriction in the Proposed Settlement is the suppression of the creative process itself. The prohibition of colors and images in virtually all tobacco advertising eliminates those elements of communication that most effectively and efficiently draw attention to an advertisement, impart information, and distinguish one brand from another. The First Amendment protects textual and non-textual expression equally. For instance, in Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 647 (1985), the Court specifically held that the use of images and colors in advertisements is "entitled to the [same] First Amendment protections afforded verbal commercial speech."

The goal of promoting the health of children, an audience which may not lawfully acquire tobacco products, does not alleviate the constitutional infirmities of the restrictions. Many lawful products (though otherwise regulated) are subject to unlawful use by minors or others -- including alcohol, gaming activities, firearms and fireworks. But it does not follow that the advertising of such products is entitled to a lesser form of First Amendment protection. Indeed, the Supreme Court has specifically rejected the argument that the commercial speech doctrine has a "vice exception". 44 Liquormart, 116 S.Ct. at 1513; Rubin v. Coors Brewing Co., 115 S.Ct. 1585, 1589 n.2 (1995) (the government has no greater latitude to regulate advertising regarding alcohol beverages and tobacco than it has to regulate advertising of other products).

Moreover, when reviewing advertising restrictions that have the asserted purpose of protecting young people, the Supreme Court repeatedly has stated that "the government may not 'reduce the adult population . . .to reading only what is fit for children.'" Bolger v. Youngs Drugs Product Corp., 463 U.S. 60, 73 (1983) (quoting Butler v. Michigan, 352 U.S. 380, 383 (1957)). Two of the Supreme Court's more recent decisions invalidated restrictions on alcohol beverage advertising, even though alcohol beverages, like tobacco products, cannot be lawfully obtained by children. See 44 Liquormart, 116 S.Ct. 1495; Coors Brewing Co., 115 S.Ct. 1585.

Indeed, the Supreme Court recently reaffirmed this principle in the case involving the Communications Decency Act. The Court stated that "[i]t is true that we have repeatedly recognized the governmental interest in protecting children from harmful materials. But that interest does not justify an unnecessarily broad suppression of speech addressed to adults." Reno v. ACLU, 117 S. Ct. 2329, 2346 (1997) (citations omitted). In his testimony to the Judiciary Committee last summer, Professor Laurence Tribe emphasized precisely this same point:

Protecting children is plainly an important and legitimate governmental purpose. But in the recent Communications Decency Act case, the Supreme Court reaffirmed the basic principle that speech to adults may not be reduced to that appropriate for children. (Citations omitted). The First Amendment objection here is even stronger than it was in the Internet case and the other decisions I have cited. For what is harmful about

tobacco is obviously not the advertising itself (the speech) but the tobacco's use. In contrast, in the Internet case, the government's interest was in preventing children from being exposed to indecent exposure on the computer; the speech itself was alleged to have caused harm. If tobacco sales to minors, and advertising aimed specifically at minors, may be directly regulated -- as they obviously may be -- a court is not likely to uphold draconian limits on what adults may hear and see.

In short, Congress should avoid the constitutional quagmire of enacting tobacco

advertising restrictions.

## IV. THE FEDERAL TRADE COMMISSION HAS THE AUTHORITY AND EXPERTISE TO REGULATE TOBACCO ADVERTISING EFFECTIVELY

In addition to our primary First Amendment concerns, FAC also questions the wisdom of delegating significant authority for tobacco advertising regulation to the FDA. The Federal Trade Commission, not the FDA, has the expertise and the proper authority to regulate tobacco advertising, an authority which the FTC actively employs. In contrast, FDA's traditional focus has been on regulating the safety of food, and the safety and effectiveness of drugs and medical devices.

The federal court in our lawsuit against the FDA correctly concluded that Congress intended the FTC, not FDA, to exercise primary authority over tobacco

advertising. American Advertising Federation et. al. v. David Kessler et al., 958 F. Supp. 1060, at 1085, n. 29. To be sure, the Congress can delegate this authority however it best sees fit. Nevertheless, FAC believes that Congress was correct in deciding to delegate enforcement authority to the FTC.

Beginning in 1965, with the Federal Cigarette Labeling and Advertising Act ("FCLAA") (15 U.S.C. § 1331 et seq.), various amendments to that Act, and continuing with the Comprehensive Smokeless Tobacco Health Education Act ("CSTHEA"), 15 U.S.C. §§4401-08, Congress has determined how tobacco advertising should be regulated and has given the FTC enforcement authority. Under the FCLAA and CSTEA, the FTC administers the advertising regulations, reports annually to Congress on cigarette advertising, and may include in its reports proposed legislation to impose further advertising restrictions.

The FTC also possesses substantial complementary authority over tobacco advertising practices under Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. The FTC has not hesitated to exercise its authority and established expertise over tobacco advertising. Last summer, the FTC launched an investigation of R.J. Reynolds Tobacco Company alleging that the Joe Camel advertising campaign constituted unfair acts and practices under Section 5 of the FTC Act. Earlier FTC enforcement measures have included actions against Brown & Williamson Tobacco Corp. for false and misleading advertising related to tar ratings. *See FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35 (D.C. Cir. 1985); *see also R.J. Reynolds Tobacco Co. v. FTC*, 192 F.2d 535 (7th Cir. 1951); *Lorillard v. FTC*, 186 F.2d 52 (4th Cir. 1950).

Last September, the FTC proposed a new regulatory framework for the means by which the tobacco industry measures tar and nicotine yields, and discloses those numbers in its advertising. In addition, the FTC proposed additional warnings on advertisements that would caution smokers that the amount of tar and nicotine they receive from a cigarette depends on how intensely they breathe in the smoke.

By comparison, FDA has only very limited regulatory authority, experience and expertise over advertising practices. In 1938, when Congress first passed the Food, Drug and Cosmetic Act, it decided to give FDA authority to regulate the safety and effectiveness of drugs and medical devices, but passed a parallel statute that same year, the Wheeler-Lea Amendments to the FTC Act, to give all jurisdiction over the advertising of such products to the FTC. In subsequent years Congress has on only two occasions extended limited advertising jurisdiction to FDA: with respect to prescription drugs in 1962, and then with respect to restricted medical devices in 1976. Courts have recognized this division of authority and expertise between FDA and the FTC. See Thompson Medical Co. v. FTC, 791 F.2d 189, 193 (D.C. Cir. 1986) (contrasting FDA's expertise with respect to evaluating drug safety and efficacy with FTC's "substantial expertise" in evaluating claims of efficacy and misleading or deceptive advertisements.)

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[4] CIGARETTE TESTING METHODOLOGY: TAR, NICOTINE AND CARBON MONOXIDE YIELDS DETERMINATION AND ADVERTISING RATINGS. 62 FED. REG. 48,158 (1997) (PROPOSED SEPTEMBER 12, 1997).

FDA has absolutely no experience with tobacco product advertising. Nevertheless, the Proposed Settlement recommends supplanting the FTC, the agency with the proven regulatory experience and expertise over tobacco advertising, with the inexperienced and unproven FDA. FAC urges the rejection of such an unwise and unnecessarily wasteful recommendation.

## V. CONCLUSION: CONGRESS SHOULD NOT ENACT THE PROPOSED SETTLEMENT'S ADVERTISING RESTRICTIONS

In conclusion, FAC urges Congress not to enact the Proposed Settlement's advertising restrictions because of the troubling First Amendment consequences that it would entail. We are hopeful that Congress will accomplish many of the important public health benefits and wise proposals in the Proposed Settlement. However, let us be clear: if Congress enacts a bill that mandates broad tobacco advertising restrictions, a constitutional lawsuit will follow, tying up the legislation for years, and likely resulting in a decision that will undo much that Congress seeks to accomplish. This result will be bad for kids; bad for Congress and bad for free speech.

## APPENDIX A

## APPENDIX B

## SUMMARY OF THE PROPOSED SETTLEMENT'S

## TOBACCO ADVERTISING AND MARKETING RESTRICTIONS

The Proposed Settlement would impose broad and draconian restrictions on tobacco advertising and marketing activities. These restrictions mirror many of the measures contained in the Food and Drug Administration's proposed anti-tobacco regulations and, in certain instances, even go further. Taken as a whole, the proposed restrictions, if they were to be enacted into federal law, would constitute the broadest censorship ever on the advertising of a legal product in the United States. The restrictions within the Proposed Settlement would:

- ban all outdoor tobacco product advertising, including in enclosed stadia and storefront windows;

- ban the use of human images and cartoon characters *in* all tobacco advertising and on tobacco product packages;

- restrict permissible tobacco product advertising to a "tombstone" format of black text on a white background, except for advertising in "adult-only" facilities and in "adult" publications;

- ban all non-tobacco merchandise, including caps, jackets or bags bearing the name, logo or selling message of a tobacco brand;

- ban offers of non-tobacco items or gifts based on proof of purchase of tobacco products;

- ban event sponsorships, including concerts and sporting events, in the name, logo or selling message of a tobacco brand;

- prohibit tobacco product advertising on the Internet unless designed to be inaccessible in or from the United States;

- restrict point-of-sale tobacco product advertising to 2 tombstone-formatted advertisements measuring 1 foot by 1 foot, or 1 tombstone advertisement measuring 2 feet by 2 feet, and require that such advertisements be 2 feet away from any fixture on which candy is displayed for sale;

- prohibit the use of non-tobacco brand names as brand names of tobacco products, except for those products in existence as of January 1, 1995;

- require cigarette and smokeless tobacco product advertisements to carry the FDA-mandated statement of intended use ("Nicotine Delivery Device");

- ban direct and indirect payments for tobacco product placement in movies, television programs and video games;

- prohibit direct and indirect payments to "glamorize" tobacco use in media appealing to minors, including recorded and live performances of music; and

- require that the use, in both existing and future brand studies, of words currently employed as product descriptors (*e.g*., "light" or "low tar") be accompanied by a mandatory disclaimer in advertisements (*e.g.*, "Brand X not shown to be less hazardous than other cigarettes"); and

- examples of all new advertising and tobacco products labeling would have to be submitted to FDA concurrently with their introduction into the marketplace for FDA's on-going review.